No. 85-422 (2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

COLONIAL PIPELINE COMPANY,
Appellant,

v.

STATE OF ALABAMA,
Appellee.

On Appeal from the Court of
Civil Appeals of Alabama and the
Supreme Court of Alabama

MOTION TO DISMISS OR AFFIRM

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No. 85-422

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SUPREME COURT OF THE UNITED STATES
October Term, 1985

COLONIAL PIPELINE COMPANY,
Appellant,

v.

STATE OF ALABAMA,
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MOTION TO DISMISS OR AFFIRM

May it please the Court:

Appellee, State of Alabama, pursuant to Rule 16 of the Rules of the United States Supreme Court, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Alabama on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I. THE STATE STATUTES INVOLVED AND THE NATURE OF THE CASE

A. The Statutes

This appeal raises the question of the validity under the Equal Protection Clause of the United States Constitution of certain provisions of the Alabama ad valorem

tax laws. Amendment 373, Constitution of Alabama 1901, provides for four classifications of property for ad valorem tax purposes, with the property of utilities being classified as Class I. Property in this class is assessed at the highest rate of assessment of 30 percent. Section 40-8-1, *Code of Alabama 1975*, provides a definition of the four classifications of property contained in Amendment 373. Section 40-8-1(b)(1) defines property of utilities to be "all property assessed for taxation by the Department of Revenue pursuant to the provisions of Chapter 21 of this title." Section 40-21-1, *Code of Alabama 1975*, states that it shall be the duty of the Department of Revenue to assess for taxation the property of various listed types of businesses, including "pipelines for transporting or furnishing natural, manufactured or by-product gas, water, oil, gasoline or other commodities of commerce." Thus, the property of oil pipelines such as Colonial is taxed at the 30% assessment rate applicable to utilities, inasmuch as oil pipelines are statutorily defined as utilities.

B. The Proceedings Below

The Alabama Department of Revenue entered an assessment against Colonial for the 1982 tax year based on its determination that Colonial constitutes a utility under Alabama law. Colonial appealed to the Circuit Court of Montgomery County, Alabama, contending that the statutory definition contained in §40-8-1 is in violation of Amendment 373 to the Constitution of Alabama of 1901, which amendment defines Class I property as "all property of utilities used in the business of such utilities," and that the classification of oil pipelines as utilities for ad valorem tax purposes violates the Equal Protection Clause of the United States Constitution. The Circuit Court (which is the trial court in Alabama) agreed with Colonial, whereupon the State appealed to the Court of Civil Appeals of Alabama,

which reversed the trial court and ruled that Alabama's taxing scheme as applied to Colonial is valid under both state and federal law. After granting Colonial's petition for a writ of certiorari to the Court of Civil Appeals and hearing oral argument, the Alabama Supreme Court quashed the writ as improvidently granted, thus allowing the opinion of the Court of Civil Appeals to stand.

II. ARGUMENT

This Case Presents No Substantial Question Not Previously Decided By This Court.

It is well-established that classifications for purposes of taxation must meet the rational basis test enunciated by this court in the case of *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1958), in which it was stated that:

> The states have a very wide discretion in the laying of their taxes. [The Equal Protection Clause] imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation . . . [The State] is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. [Citations omitted].
>
> . . . the State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be

> that the classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. [Citations omitted]
>
> . . . [I]t has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it.

In *Lehnhausen v. Lake Shore Auto Parts Company*, 410 U.S. 356, 93 S. Ct. 1801, 35 L.Ed.2d 351 (1973), this Court stated that there is a presumption of constitutionality which can be overcome only by the most explicit demonstration that a classification is hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.

Colonial bases its equal protection argument primarily upon the fact that motor carriers, buslines and airlines are not assessed centrally by the Department of Revenue as Class I property, while oil pipelines are so assessed. Although Colonial seeks to lump itself into the same class with buslines, bargelines, motorcarriers, etc., product pipelines are not identical to these other transportation modes and none of the others are identical to each other. It is apparent that pipelines may be separately classified from other transportation modes without violating the Equal Protection Clause, as demonstrated by the fact that the Congress has required that states treat railroads differently from other transpor-

tation property in adopting the Four R Act, 49 U.S.C. §11503, which applies only to railroads; by adopting the Motorcarrier Act, 49 U.S.C. §11503(a), which applies only to motorcarriers (trucks); and by enacting a similar act with regard to the taxation of airlines in the Tax Equity and Fiscal Responsibility Act of 1982, §532, amending 49 U.S.C. Section 1513(b) and (d), which has the effect of forbidding the state from assessing property of air-carriers at a higher rate than other commercial and industrial property. In fact, the Congress has gone so far as to authorize the FERC to regulate gas pipelines differently from the way in which it regulates oil pipelines in that gas pipelines are required to obtain a certificate of necessity and convenience before they are built, while this is not required of oil pipelines. If differentiations may be made as between different types of pipelines, it is apparent that they may be made as between separate transportation modes such as between pipelines and motorcarriers, airlines, railroads, etc. If Colonial's theory that all transportation modes must be treated equally for tax purposes is correct, then it follows that each of the foregoing federal acts are unconstitutional, since each was adopted at a different time to apply to only one transportation mode, thus according different treatment to that mode from that which is accorded to the others.

The Alabama Supreme Court found that under state law, Colonial constitutes a utility and that consequently it should be taxed as a utility. Some other transportation modes are not taxed as utilities, either because the State is forbidden by federal law from taxing them at the rate at which other utilities are taxed, or for other reasons. The State of Alabama has enacted a valid taxing scheme under which each member of a particular classification is taxed equally. Colonial complains because it is taxed at the same rate as other utilities and argues that because it is a transportation company as well as a

utility, it may not be taxed at the same rate as are other utilities because some other transportation companies are not considered to be utilities for tax purposes. The State submits that since Colonial is a utility, it may be taxed at the same rate as are other utilities without violating the Equal Protection Clause. In *New York Rapid Transit Corp. v. New York*, 303 U.S. 573, 58 S.Ct. 721, 82 L.Ed. 1024, rehearing denied 304 U.S. 588, 58 S.Ct. 939, 82 L.Ed. 1548, this Court stated that in taxing utilities as a class the legislature is not required to make meticulous adjustments for a particular subclass of utility.

This court has never held that all forms of transportation companies must be considered as belonging to the same classification for tax purposes. Only if this court so held could Colonial prevail in this case. A state may validly choose to favor one form of transportation over another, or to tax one form of transportation and not others. Were this not true, then not only would the federal statutes previously cited herein be unconstitutional, but so would the Amtrack system, subsidized city bus systems, and every other transportation company that obtains any special dispensation from the government. This Court has held that it is constitutionally valid to separately classify many kinds of corporations or companies, including particular types of transportation companies, such as railroads, *Nashville, C. & St. L. R. Co. v. Browning*, 310 U.S. 362, 60 S.Ct. 968, 84 L.Ed. 1254; *Baker v. Druesedow*, 263 U.S. 137, 44 S.Ct. 40, 68 L.Ed. 212; and express companies, *Western U.Tel. Co. v. Indiana*, 165 U.S. 304, 17 S.Ct. 345, 41 L.Ed. 725; *Pacific Exp. Co. v. Seibert*, 142 U.S. 339, 12 S.Ct. 250, 35 L.Ed. 1035. Colonial has failed to meet its burden of proving that Alabama's taxing scheme has no rational basis. Its argument presents no substantial federal question in light of the precedent concerning the burden

of one attacking a taxing scheme under the Equal Protection Clause.

Colonial has done a masterful job of attempting to paint the Alabama Supreme Court's ruling in this case with the same brush as the ruling in *Metropolitan Life Insurance Company v. Ward*, ____ U.S. ____, 105 S. Ct. 1676 (1985), and other cases dealing with discrimination by a state against foreign corporations in favor of domestic corporations. Since this case does not concern in any way the domestic versus foreign discrimination question, the cases cited by Colonial in its jurisdictional statement are only marginally applicable to the present case.

III. CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in this cause by the Supreme Court of Alabama and the Alabama Court of Civil Appeals.

Respectfully submitted,

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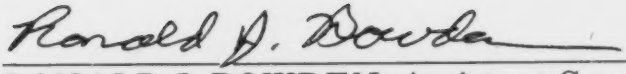

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PROOF OF SERVICE

I, Ronald J. Bowden, a member of the Bar of the Supreme Court of the United States and attorney of record for Appellee, State of Alabama, hereby certify that on the 8th day of October, 1985, I served copies of the foregoing Motion to Dismiss or Affirm on all parties required to be served by depositing a copy of same in the United States Mail, with first-class postage prepaid, addressed to:

N. Lee Cooper
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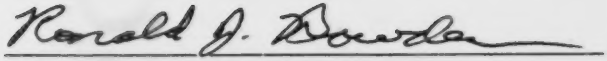

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